UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

John J. Walsh, Jr., Regional Director, Region 01, National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD **Petitioner** vs **W.B. MASON CO., INC.** **Respondent**	C.A. No. 1:16-cv-11934 - NMG

PETITIONER'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR INJUNCTIVE RELIEF

Petitioner files this Memorandum of Law in order to assist the Court in evaluating the need for the requested injunctive relief. In particular, the memorandum will address the recently issued Decision of the Administrative Law Judge (the ALJD) and its impact on the need for injunctive relief; W.B. Mason Co., Inc.'s (Respondent) overall response to International Brotherhood of Teamsters Local Union No. 25's (the Union) organizing campaign, including the discharges; the likelihood of success on the merits; the appropriate standard of review and the issue of credibility resolutions; the appropriateness of interim reinstatement; and the timing of the Petition.

THE ADMINISTRATIVE LAW JUDGE FOUND THAT RESPONDENT ENGAGED IN MULTIPLE HALLMARK VIOLATIONS OF THE ACT AND RECOMMENDED REINSTATEMENT AND A BARGAINING ORDER

On November 4, 2016, Administrative Law Judge Mark Carissimi (the ALJ or the Judge) issued his Decision and Recommendation,[1] in which he found that Respondent had committed numerous violations of the Act, including the hallmark violations as alleged in the Complaint and detailed in the Petition for Injunctive Relief.[2] Specifically, ALJ Carissimi found:

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by
   (a) Soliciting grievances and impliedly promising to remedy them.
   (b) Interrogating employees regarding their union activity.
   (c) Threatening employees with a loss of direct access to it if the employees selected the Union as their bargaining representative.
   (d) Informing employees of the futility of selecting the Union as their bargaining representative.
   (e) Creating the impression that the employees' union activities were under surveillance.
   (f) Offering employees transfers, raises and promotions to employees in order to discourage them from supporting the Union.
   (g) Attributing the loss of a wage increase to the Union.
   (h) Interrogating an employee about his NLRB subpoena.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by
   (a) Granting benefits to employees by improving the efficiency of its warehouse, delivery routes, and truck loading, and assisting employees in the performance of their duties, in order to discourage them from supporting the Union.
   (b) Laying off Kerby Chery, Jason Cobbler, and Elton Ribeiro because of their union activities.
   (c) Suspending and discharging Marco Becerra and Sean Brennan because of their union activity.

[1] The ALJD, including the proposed remedy, is not final until the Board adopts it. Because it is not the final administrative decision of the Board, the decision does not negate the necessity for injunctive relief. See, e.g., *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000).

[2] The ALJ dismissed only one allegation concerning the hallmark violations relevant to this proceeding: the discharge of Oscar Castro. Based on the Judge's determination regarding Castro, Petitioner withdraws its request to this Court for interim reinstatement of Castro in this injunction proceeding, and specifically seeks to withdraw paragraphs q(1) and (2) of the Petition for Injunctive Relief. Petitioner reserves the right to file Exceptions to the Board with respect to the ALJ's findings regarding Castro. The hallmark violations on which the request for a bargaining order is based appear in bold face in the ALJ's Conclusions of Law, set forth in their entirety below.

(d) Withholding an expected annual wage increase from employees in December 2015 in order to discourage them from supporting the Union.
(e) Granting a wage increase to employees in May 2016 in order to discourage them from supporting the Union.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by
(a) Since September 28, 2015, failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> **All full-time and regular part-time supply drivers, supply driver helpers and supply shuttle drivers employed by the Employer at its Summer Street, South Boston, Massachusetts facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.**

(b) Unilaterally failing to grant an annual wage increase in December 2015.
(c) Unilaterally granting an annual wage increase in May 2016.[3]

Judge Carissimi carefully evaluated the extensive record, finding merit in many allegations and recommending dismissal of others. He carefully weighed the testimony of each witness and articulated the sound basis for his credibility determinations. The ALJD strongly buttresses Petitioner's contentions, as alleged in the Petition for Injunctive Relief, that (a) there is reasonable cause to believe that Respondent violated the Act and (b) it is just and proper to grant the requested injunction. Specifically with respect to the First Circuit's emphasis on Petitioner's probability of success on the merits, the ALJD provides substantial assurance that Petitioner will prevail on the merits in the administrative proceeding. Courts have repeatedly relied on ALJ decisions in Section 10(j) proceedings, finding that favorable ALJ decisions bolster the Board's "likelihood of success."[4]

[3] ALJD-69-70. Citations to the administrative record will be designated "ALJD-(page number)" for references to the ALJ's decision, "T-(page number)" for transcript references, "GC-(exhibit number)" for General Counsel exhibits, and "R-(exhibit number) for Respondent's exhibits.

[4] See, e.g., *Pye v. Excel Case Ready*, 238 F.3d 69 (1st Cir. 1999); *Rivera-Vega v. ConAgra, Inc*., 70 F.3d 153, 157 n. 3, 160-61 (1st Cir. 1995).

IN VIEW OF THE ALJ DECISION, INJUNCTIVE RELIEF IS EVEN MORE STRONGLY WARRANTED

Judge Carissimi recommended the strongest possible remedy for the Respondent's unlawful actions. In addition to the Board's traditional remedies, the ALJ recommended issuance of a *Gissel* bargaining order; a broad cease and desist order directing Respondent to refrain not only from conduct *similar* to that alleged in the Complaint, but from *all other* unlawful conduct; and a public reading of the Notice to Employees by Branch Manager DeAndrade in the presence of all bargaining unit employees and an agent of the Board. These remedies, among the most substantial in the Board's arsenal of remedies, are designed to mitigate the effects of Respondent's serious and pervasive unfair labor practices, and to restore the status quo that existed before Respondent embarked on its unlawful campaign to eviscerate employee free choice.

Under Section 102.46 of the Board's Rules and Regulations, the parties have 28 days to file exceptions with the Board. Furthermore, in accordance with the Board's Rules and Regulations, parties may file an answering brief opposing any exceptions that are filed, after which final reply briefs may be submitted. If the past is a prologue, we can expect that Respondent will continue to vigorously contest this matter before the Board. In view of the extensive administrative record and lengthy ALJD, it is likely that the Board will require a considerable period of time following the filing of exceptions and their briefing to review the record, analyze the ALJ's 79-page Decision and accompanying proposed Notice to Employees, evaluate any exceptions to the ALJ's factual and legal findings, and issue its final Decision and Order. Although the Board's internal rules require it to expedite the processing of Section 10(j) cases such as this one, there is no reason to conclude that a Board order is "imminent" and the very best case scenario would see a Board order issue in

the range of six months to a year from now. Because the timing of a final Board Order is distant and uncertain, the risk of irreparable harm to employees and the Union continues, and Respondent continues to reap the rewards of its unlawful actions. In the absence of injunctive relief, the union will appear ever more impotent and the federal labor law irrelevant. Employees will see even unlawfully terminated peers continue to be excluded from the work place and the well of support for the Union will completely dry up. Therefore, a preliminary injunction is still just and proper in this matter.

THE DISCHARGES WERE BUT ONE WEAPON IN RESPONDENT'S ARSENAL OF COERCIVE TACTICS TO STRIP EMPLOYEESOF THEIR FREE CHOICE

As the ALJ found, Respondent engaged in a series of highly coercive, flagrant, and ongoing actions designed to ensure that its employees are never represented by Teamsters Local 25 or any other union. The National Labor Relations Board has recognized that certain types of unfair labor practices are particularly devastating to the exercise of employee free choice, and has categorized such violations as "hallmark violations." As set forth in the ALJD (ALJD-64-65), the hallmark violations in this matter include:

- Discharging five union supporters within days of the Union's demand for recognition;
- Attempting to bribe three union supporters with offers of promotions, transfers, and raises;
- Making operational changes designed to address the very complaints it had unlawfully solicited from employees, complaints that had led employees to seek union representation;
- Telling employees their wage increase would be delayed because of the Union, and then delaying it well beyond the usual timeframe for granting raises; and
- Granting employees an unprecedented wage increase, averaging 21.7%, without explanation or business justification, at a time when employees were being subpoenaed and prepared by the government for trial.

These violations, most of which are uncontested, strongly support a bargaining order.

The discharges, while serious and highly coercive, were only one of Respondent's unlawful strategies during the organizing campaign. As the ALJ found, the five employees were fired against a backdrop of unlawful statements, interrogation, promises of benefits, and other conduct coming from the highest levels of Respondent's management.[5] Indeed, many of the unlawful statements were made by managers so removed from Respondent's day-to-day operations that employees did not know which manager was which, and understandably confused them in their testimony. The discharges were the flip side of the attempted bribes: some employees were fired while others were offered advancement in the company. Whether by instilling fear or purchasing loyalty, both strategies were aimed at chilling employee choice. Finally, the discharges were rendered even more coercive by the simultaneous warning that the employees' annual pay raise was being held hostage by the Union. The six-month delay in granting the raise, together with the unexplained timing and unjustified scale of the raise, substantially undermined employee support for a union.[6]

Respondent was not content to crush the organizing campaign in 17 days. It saved its most egregious, flagrant, and damaging blow until the eve of trial, making sure its employees understood that their benefits flowed from the company, and that they could just as easily be withheld.[7] The Board and courts have called these well-timed increases in

[5] "When the highest level of management conveys the employer's anti-union stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *Michael's Painting, Inc.,* 337 NLRB 860, 861 (2002), enfd. 85 Fed. Appx. 614 (9th Cir. 2004).

[6] See., e.g., *Novelis Corp.*, 364 NLRB No. 101, slip op. at 4 (Aug. 26, 2016) (wage increase during organizing campaign "likely to convince employees that with an important part of what they were seeking in hand, union representation might no longer be needed.") (Citations omitted).

[7] Unlawfully granted wage increases are a continuing reminder that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

benefits the "fist in the velvet glove."[8] They are among the most coercive actions an employer can take, particularly because the Board has no remedy for them. As Respondent knows, the Board will not order it to rescind a wage increase,[9] a practice that guarantees employees will receive weekly reminders that they do not need a union to improve their wages and benefits.

Respondent's hyper-focus before this Court on the discharges is intended to distract the Court from the larger picture. Respondent unlawfully devastated employee support for the Union, deploying a variety of weapons virtually certain to destroy the "laboratory conditions" needed for a free and fair election. The strategy was entirely successful, albeit unlawful. By firing employees for pretextual reasons, offering bribes to the most ardent union supporters, soliciting employees' complaints and promising to remedy them, addressing long-problematic operational issues, and withholding the employees' annual wage increase, Respondent made sure that no employee would be untouched by its conduct.[10] Then, in a bold move for which it has offered virtually no explanation,[11] Respondent made sure its employees knew where their bread was buttered, doling out a 21.7% average wage increase along with retroactive checks estimated to be between

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[8] *Id.*

[9] "Grants of wage increases have long been held to be a substantial indication that a bargaining order is warranted because they have 'a particularly long lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees.'" *Novelis Corp.*, 364 NLRB slip op. at 4, quoting *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enfd. 531 F.3d 312 (4th Cir. 2008).

[10] Unfair labor practices affecting all employees, such as the wage increase and other grants of benefits alleged here, strongly support the granting of a bargaining order. *Evergreen America*, 348 NLRB at 180-81.

[11] Underscoring its flagrantly unlawful conduct, Respondent has never even attempted to explain why the May 2016 raise was so disproportionate to prior raises, averaging seven times more than the last five years' increases. Its only explanation for granting the raise at the chosen time was that May was "inherently a better month" for the company, because "the amount of days in the month for us is better for us" (T-955). The ALJ found no evidence supporting a legitimate business justification for either the timing or the scale of the raise.

$3000 and $12,000 per employee. This final straw, which clearly indicates Respondent's inclination to continue violating the law, occurred when employees were at their most vulnerable and impressionable, just days before the administrative hearing.

MANY OF THE VIOLATIONS INVOLVE NO CREDIBILITY ISSUES

It is noteworthy that there are no credibility disputes with respect to many of the more serious violations. First, Respondent produced no evidence refuting the testimony of three witnesses who described the offers of promotions, transfers, and wage increases, and the ALJ's findings were based on the uncontradicted testimony of Petitioner's witnesses. Second, there is no dispute that employees' wage increases were delayed from December 2015 to May 2016.[12] Nor, as the ALJ noted, is there any dispute that, immediately after the Union's demand for recognition, Respondent recruited managers from various facilities to help streamline its delivery processes, reacting to employees' complaints and addressing the workplace issues that were most concerning to drivers (ALJD-22-23). Finally, it is undisputed that on the eve of the administrative hearing, Respondent granted employees a wage increase averaging seven times the normal increase, along with large checks compensating employees for the unlawful six-month lapse in granting the increase. In view of these undisputed facts, Respondent's refrain that there are too many credibility disputes for this Court to order the requested relief rang hollow before the ALJ Decision issued, and is even less persuasive now.

THE DISCHARGES WERE UNLAWFULLY MOTIVATED, AND THERE IS A SUBSTANTIAL LIKELHOOD THAT THE BOARD WILL ORDER REINSTATEMENT OF THE FIVE EMPLOYEES

[12] Respondent's insistence that raises are not always given in December is disingenuous. Its own payroll records and the testimony of its branch manager clearly establish that the wage increase has never been delayed beyond January (T-162; T-281-82; T-937).

As discussed above, the discharges were but one part of Respondent's coordinated attack on the Union and on employee free choice. Petitioner is highly likely to obtain reinstatement and back pay for the five individuals, as the ALJ found overwhelming evidence of disparate treatment and concluded that Respondent's reasons for discharging them were pretexts. The facts related to those discharges have been fully briefed, and will simply be summarized herein.

First, Sean Brennan was discharged only days after receiving an offer of a transfer he had been requesting for many months, as well as a significant hourly raise (T-368-69). He was fired purportedly for skipping certain same-day deliveries, something he had done with his employer's knowledge and approval for the 19 months of his employment. At trial, his supervisor denied authorizing this, but admitted knowing that Brennan consistently skipped his Morrissey Boulevard same-day deliveries (T-787-88; T-791-92; T-798-99). Brennan's testimony – that he never made those deliveries **unless** they were marked urgent (T-375) – is corroborated by Respondent's own records, which clearly show that Brennan made only 12 same-day deliveries to Morrissey Boulevard customers in 12 months (R-15).[13] It was not until Brennan announced his support for the Union that this practice became an issue. Because the pretextual nature of his discharge could not be clearer, the ALJ concluded that Brennan's discharge was unlawful (ALJD-55), and recommended a make whole remedy of reinstatement and back pay (ALJD-71).

Respondent's business records demonstrate that it fired Marco Becerra for equally pretextual reasons. Becerra admittedly asked a customer to split its order between morning

[13] During oral argument, Respondent's counsel inaccurately stated, as he did in his brief, that Brennan testified he never made same-day deliveries on Morrissey Boulevard. As the record clearly demonstrates, however, and the ALJ found, Brennan actually stated that he never made them unless they were marked urgent (ALJD-49-50; T-375).

and afternoon deliveries, and said he would split it himself if the customer would not (T-477; GC-53). He did not, as Respondent insists, tell the customer to order less product. Despite Respondent's insistence that no other employee had ever done what Becerra did, a customer's complaint against driver Matt Cadoff describes virtually identical conduct:

> Your driver clearly hates his job, which is fine … too each their own [sic], but he should not have such negativity when dealing with the customers. **He is constantly complaining about my orders being too big, and why I have to place such large orders** for Friday deliveries. He acts as if I'm burdening him with my orders …. (GC-45, emphasis added).

It requires little imagination to see the similarity between Becerra's request to split the order in two and Cadoff's complaint to the customer that it was ordering too much product. The only real difference between them is in their timing: Cadoff's complaint came long before any union activity was contemplated, and Becerra's immediately after the Union's demand for recognition.[14] As the ALJ pointed out, the timing of Becerra's discharge, together with the indisputable evidence of disparate treatment, points to a strong likelihood that the Petitioner will prevail (ALJD-43-44). As a result, the ALJ recommended reinstatement and back pay for Becerra (ALJD-71).

Finally, the ALJ correctly concluded that the three "laid off" employees were, in fact, unlawfully terminated. Respondent has not, and cannot, overcome Petitioner's evidence regarding the unlawfulness of the layoffs. First, as the ALJ noted, Respondent offered no testimony to contradict the employees' testimony that they were never told they were seasonal (ALJD-27-28; T-501; T-516). Respondent correctly points out that driver helper Jason Cobbler indicated on his authorization card that he was a seasonal employee (GC-

[14] As fully briefed, Respondent's records are replete with customer complaints, including ones threatening to stop doing business with the company because of its drivers (see, e.g., GC-35, pp 2, 5, 10, and 12; GC-38, pp 1-5; GC-39; GC-46; GC-51; GC-44; GC-48); yet not a single employee was discharged for customer complaints until Becerra's discharge on the heels of the Union's demand for recognition.

72), but completely ignores Cobbler's sworn explanation that it was rank and file employees, not any company representative, who informed him he was seasonal (T-501; T-506-07). Most important, Petitioner's likelihood of success on the three driver helpers does not depend on a finding that they were not seasonal. As the ALJ thoroughly analyzed, the record establishes beyond a doubt that Respondent has not laid off even one seasonal employee in this department in the past 3-1/2 years. Of the 15 "seasonal" driver helpers hired since then, only Chery, Cobbler, and Ribeiro have been laid off. The ALJ concluded that Respondent's disparate treatment of these three open Union supporters, together with the timing of their discharges, is strong evidence of its true motivation (ALJD-30-32). Whether or not they were seasonal employees, they were unlawfully discharged, and the ALJ recommended reinstatement and back pay for each of them (ALJD-71).

The ALJ specifically concluded that Respondent has not demonstrated that it would have discharged any of the five employees in the absence of their union activity (ALJD-32, 44, and 55).[15] As a result, he concluded that the discharges were unlawfully motivated, and recommended reinstatement of all five employees to their former positions. The Petitioner has therefore met its burden of demonstrating to the Court that it is highly likely to prevail on the discharge allegations, and that the Board will order their reinstatement and back pay.

INJUNCTIVE RELIEF MUST INCLUDE INTERIM REINSTATEMENT OF FIVE DISCHARGED EMPLOYEES

The discharge of active and open union supporters invariably has a chilling effect on those employees who remain in the workplace. Until they are returned to their former jobs, employees reasonably believe that any expressed support for the Union is likely to result in a similar fate. Even if the employees are eventually returned to the workplace by a Board

[15] *Wright Line, Id.*

order enforced by a Court judgment, the long absence of the employees will be noted by the remaining work force. Predictably, employee interest in organizing dissipates, support for the union evaporates, and the collective-bargaining process is irreparably harmed.

In *Excel Case Ready*, the First Circuit recognized the corrosive effect of terminations on the organizing and bargaining processes. Such terminations, the Court stated, carry the risk of "'a serious adverse impact on employee interest in unionization' and can create irreparable harm to the collective bargaining process." *Excel Case Ready,* 238 F.3d 69, 75 (1st Cir. 2001), quoting *Asseo v. Pan American Grain*, 805 F.2d 23, 27 (1st Cir. 1986). The Court noted that "the fear of employer retaliation after the firing of union supporters is exactly the 'irreparable harm' contemplated by Section 10(j)." *Excel Case Ready*, 238 F.3d at 75.

Although *Excel* did not involve an interim bargaining order, the case is certainly instructive with respect to this Court's treatment of the discharge allegations pending before it. *Excel* involved the discharge of three union activists and two anti-union employees, who were alleged to have been discharged in order to cover-up the real reason for firing one of the activists. As in the present case, the employer asserted all the discharges were lawful. The District Court ordered the interim reinstatement of all five employees, and the First Circuit upheld the injunction, finding that the discharges had brought the organizing campaign to a halt. Neither the existence of credibility disputes nor the absence of an administrative decision prevented the Court from ordering interim reinstatement of the discharged employees. Instead, the Court properly limited its inquiry to whether the petitioner had established reasonable cause, and whether injunctive relief was just and

proper. As the *Excel* District Court stated, "The District Court is not empowered to determine whether an unfair labor practice actually occurred."[16]

An interim reinstatement order is not intended to protect the private rights of the individuals discharged, but to protect the statutory rights of other employees working for Respondent. Offers of interim reinstatement can be expected to have multiple remedial effects, many specifically recognized by the First Circuit in *Excel*. First, interim reinstatement restores the status quo regarding the makeup of the bargaining unit to a time before the unlawful discharges occurred. Second, offers of reinstatement send an important message to employees who may be fearful that supporting the Union could cost them their jobs. Third, interim reinstatement puts active Union supporters back into the workforce, where they can help resurrect the campaign that was undermined by Respondent's unfair labor practices. The five employees will be living evidence of the Union's and government's effectiveness in protecting their statutory rights. In these ways, interim reinstatement works in tandem with the requested interim bargaining order to ensure the greatest likelihood that the restoration of the status quo is meaningful. An order of this Court requiring the interim reinstatement of five discharged union supporters and interim bargaining with the Union, as well as a cease and desist order enjoining Respondent from further unlawful action, will offer employees powerful reassurance that the rule of law applies to their work place, and will give meaning to the choice employees made before Respondent's coercive conduct took root.[17]

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[16] *Pye v. Excel Case Ready*, 2000 WL 33351822 (May 8, 2000), citing *Centro Medico del Turabo*, 900 F.2d at 450. The *Excel* court's recognition that it is the exclusive province of the Board to determine the facts and their legal consequences with respect to unfair labor practices powerfully argues against the Employer's contention that this Court must undertake an independent assessment of witness credibility.

[17] *Kendellen v. Evergreen America Corp*., 428 F.Supp.2d 243 (2006) (distinguishing *Hialeah Hospital*, 343 NLRB 391 (2004), and holding interim bargaining order appropriate despite passage of four years, where employer threatened plant closure and gave widespread wage increases far in excess of the norm).

THE DISTRICT COURT SHOULD NOT RESOLVE CONTESTED FACTUAL ISSUES

The District Court should not resolve contested factual issues and should defer to the Regional Director's version of the facts if it is "within the range of rationality." *Maram v. Universidad Interamericana*, 722 F.2d 953, 958 (1st Cir. 1983); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 158, 163 (1st Cir. 1995). Accord: *Fuchs v. Hood Industries*, 590 F.2d 395, 397 (1st Cir. 1979) (district court's function is limited to whether contested factual issues could ultimately be resolved by the Board in favor of the General Counsel). The District Court also should not attempt to resolve issues of credibility of witnesses, especially in view of the ALJ's comprehensive discussions of witness credibility throughout his Decision.[18] Respondent's argument that the discharges involve credibility disputes does not negate the propriety of interim reinstatement in this proceeding. Indeed, allegations of unlawful discharges under the NLRA nearly *always* involve contested credibility issues, as respondents never concede they lacked a lawful reason for their actions. Moreover, the Board has 80 years of experience evaluating plausible-sounding explanations for discharges and has of necessity developed a method of proof to separate the mere assertion of a plausible defense from instances that truly establish the lawfulness of the action. Finally, the credibility determinations underpinning the ALJ's decision are fully supported by the record, and it is extremely unlikely that the Board will overrule the ALJ. "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they

[18] See *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983); *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 237 (6th Cir. 2003); *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570 (7th Cir. 1996).

are incorrect." *In re California Gas Transport, Inc.*, 355 NLRB 465 (2010), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

WITHOUT AN INTERIM BARGAINING ORDER, THE BOARD'S FINAL REMEDY WILL LIKELY BE RENDERED MEANINGLESS

The purpose of injunctive relief under Section 10(j), and of a *Gissel* bargaining order, is not to **maintain** the poisoned status quo that has resulted from Respondent's unlawful acts, but to **restore** the status quo to the time before the company interfered with employee choice.[19] Without interim relief, Respondent's egregious and flagrant conduct would not only be left unchecked, but would ultimately be rewarded. The organizing campaign it so successfully derailed, and the employee support that fueled it, will, in all likelihood, be destroyed forever if Respondent is not ordered to recognize and bargain with the Union now, so that the Union can demonstrate, in bargaining with a lawfully constrained employer, that the Union is not a nullity. The 5th Circuit eloquently described this conundrum in *NLRB v. Schill Steel Products, Inc.*, 480 F.2d 586, 590 (5th Cir. 1973):

> The bargaining process is harmed when an employer's actions weaken a union, and that union's ability to provide effective representation is diminished. If the union cannot negotiate for better terms and conditions of employment, the interest of the employees in representation will dissipate. The impotence of the union and the loss of employee interest can create a mutually reinforcing cycle, as a lack of support among employees further diminishes the union's strength and, consequently, its ability to press for improvements that would demonstrate its worthiness to the members of the bargaining unit. If negotiations are eventually ordered by the NLRB at the end of the administrative process, a union which has been weakened in the interim by the employer's actions will be hard-pressed to secure improvements in wages and benefits at the bargaining table.

Here, as the ALJ found, the Respondent severely weakened the Union by engaging in numerous hallmark violations in a compressed period of time. The Union's weakened

[19] *Seeler v. Trading Port,* 517 F.2d 33, 40 (2d Cir. 1975) (bargaining order is "a just and proper means of restoring the pre-unfair labor practice status quo…." See also, *Ley v. Wingate of Dutchess, Inc.*, __ F.Supp.3d __, 2016 WL 1611598 (S.D.N.Y. April 22, 2016) (bargaining order does not alter status quo because "loss of support for a union after an employer's unfair labor practices is no defense to an interim bargaining order." [Emphasis in original]).

state was first demonstrated in the anti-union petition signed by employees barely two weeks after a super-majority of employees had by card authorized the Union to represent them. It was further evidenced in employees' unwillingness to testify during the Region's investigation of these charges, resulting in an extended investigation brought on, in part, by the need to subpoena witnesses who had once been eager participants. During the administrative hearing, the Respondent's chilling effect on employee support for the Union was demonstrated by the outright refusal by several employee witnesses to appear and testify under subpoena. Respondent's unlawful conduct has rendered the Union nearly impotent. Only an interim bargaining order can preserve the remedial effect of the ALJ's recommended remedy and restore the Union's power to effectively represent the employees who freely selected them.

Respondent asserts that an interim bargaining order is an extraordinary remedy. While perhaps true as a black letter statement of law, it is nevertheless indisputable that an interim bargaining order is an appropriate remedy where, as here, the circumstances warrant it. The court in *Seeler v. Trading Port,* 517 F.2d at 39, noted: "Far from being radical relief, a bargaining order designed to prevent frustration of the purposes of the Act fits well within the general principles applicable to statutory injunctions." An interim bargaining order is the appropriate remedy where an employer's unlawful conduct is so severe that other Board remedies are unlikely to restore conditions under which employees can exercise uncoerced choice in an election. It is also the appropriate remedy where the delay inherent in Board processes magnifies the likelihood that a Board order will be ineffective because employees will, with the passage of time, view the Union as impotent and unworthy of their support. The ALJ acknowledged the devastation wrought by the passage of time, recommending that Respondent be ordered to recognize and bargain with

the Union. In declaring the appropriateness of a *Gissel* Bargaining order, the ALJ noted the pervasiveness of the unfair labor practices as well as the probability that they would have a long-lasting coercive effect on bargaining unit employees (ALJD-64-65).

In particular, the Judge relied on the following factors in determining that the violations were so pervasive as to require a bargaining order: Respondent began its unlawful campaign on the heels of the Union's demand for recognition (ALJD-66); many of the violations were committed by high-level managers (ALJD-66);[20] and even those unfair labor practices that did not affect all employees were widely disseminated throughout the bargaining unit (ALJD-66). The ALJ noted, "The effect of the Respondent's initial wave of unfair labor practices … is demonstrated by the rapid dissipation of union support," as evidenced by the anti-union petition signed by most of the bargaining unit within 17 days of the demand for recognition (ALJD-67). Further, as the ALJ pointed out, Respondent's unlawful campaign did not stop there. Even though the initial response to the campaign "substantially eliminated employee support for the Union" (ALJD-67), Respondent continued its barrage of coercive conduct by withholding employees' anticipated wage increase, and then by granting them an unprecedented wage increase in May 2016. By its continuing coercive conduct, Respondent has so poisoned this well that only a court order restoring the status quo has any real chance of undoing the damage.

These types of violations are precisely the circumstances that led the Supreme Court to validate bargaining orders based on card majority in *Gissel*. An interim bargaining order, based on record evidence of employee sentiment prior to the onslaught of unfair labor practices, is required to dissipate the effects of the Employer's egregious unfair labor

[20] The involvement of high-level managers in the commission of unfair labor practices is especially coercive. *California Gas Transport, Inc*., 347 NLRB 1314, 1324 (2006).

practices, and offers the best opportunity to vindicate the statutory policy protecting employee free choice and favoring the institution of collective bargaining.

THERE IS NO UNDUE DELAY IN THE FILING OF THIS PETITION

Under the National Labor Relations Act, a 10(j) petition *cannot* be filed until after issuance of a Complaint.[21] Necessarily, this statutory prerequisite to an application for an injunction contemplates that the Agency will conduct a full and neutral investigation of the alleged unfair labor practices, and carefully evaluate all the evidence and arguments advanced by both parties. The Complaint in this matter issued on April 30, 2016, following a comprehensive investigation of numerous charges and amended charges. Dozens of witnesses were contacted, and several gave multiple affidavits as Respondent's unfair labor practices unfolded. Apart from the sheer size and complexity of the administrative investigation, Respondent unnecessarily extended the Region's investigation by denying service at its South Boston facility and by repeatedly delaying the production of subpoenaed documents. Respondent's unfair labor practices themselves interfered with the Region's investigation, as once-eager witnesses succumbed to Respondent's intimidation and refused to testify until subpoenaed.

This Petition was filed less than five months after the Complaint issued, during which time the administrative hearing of a factually complex case was completed. As fully briefed, circuit courts have granted injunctive relief upon petitions filed as much as 19 months after

[21] 29 U.S.C. Section 160 (j):

> (j) [Injunctions] The Board shall have power, *upon issuance of a complaint as provided in subsection (b) [of this section]* charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper. [emphasis added]

the complaint issued.[22] The delay of which Respondent complains, which is partly of its own making, is inherent in the process contemplated by Congress in enacting Section 10(j).

Perhaps most significantly, Respondent's claim of undue delay holds no water in view of its continuing violations. By engaging in flagrant unlawful conduct on the eve of trial, Respondent forced the Petitioner to amend its Complaint in the middle of the administrative hearing. Its cries of delay are thoroughly undermined by its willingness to continue flouting the law after the initial Complaint issued, and well after it had achieved its unlawful purpose of defeating the Union.[23]

Contrary to the Respondent's contention, it is not too late for injunctive relief. Employees discriminatorily discharged will be living evidence of the Union's power – and the government's – if they are quickly reinstated to their former positions. Their presence, along with the court-imposed bargaining obligation, will breathe new life into the organizing campaign Respondent snuffed out. This double-edged temporary remedy will re-create an environment in which the Union can preserve its remaining support, attempt to restore lost support, and bargain effectively on behalf of W.B. Mason's employees. Without injunctive relief, it *will* be too late for the Union to resurrect lost support, and Respondent will have achieved its unlawful objective.[24] While it is impossible to pinpoint the precise moment when harm becomes irreparable, one thing is clear: the party engaging in unlawful conduct,

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[22] See *Overstreet v. El Paso Disposal*, 625 F.3d 844 (5th Cir. 2010) (19-month delay while Board waited for administrative decision to issue); *Muffley v. Spartan Mining*, 570 F.3d 534 (4th Cir. 2009) (18-month delay no bar to injunction because complicated labor disputes require time to investigate and litigate); *Hirsch v. Dorsey Trailers*, 147 F.3d 243, 248-49 (14-month delay); *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953 (1st. Cir. 1983) (4-month delay became 14-month delay when district court denied injunction and circuit court reversed).

[23] See *Asseo v. Pan American Grain Co., Inc*., 805 F.2d at 26 (irreparable harm likely to result from employer's *continuing* hallmark violations).

[24] As discussed in Petitioner's initial brief and noted above, the decision of the Administrative Law Judge is not final. Without injunctive relief, enforcement of a *Gissel* bargaining order will be substantially delayed while the case is litigated to a final resolution before the Board.

denying employees their statutory right to select their own bargaining representative, should not benefit from a premature determination that it is too late to do anything about it.

The ALJD makes it clear that Respondent has engaged in a plethora of serious and pervasive unfair labor practices, as alleged in the Petition for Injunctive Relief, and Petitioner is highly likely to succeed on the merits. Based on the foregoing, and on the Decision of the Administrative Law Judge, Petitioner urges the Court to reject Respondent's arguments and to grant a temporary injunction – including an interim bargaining order, reinstatement of the five discharged employees, and a temporary cease and desist order – in order to protect employee free choice, prevent further erosion of employee support for the Union, and preserve the effectiveness of a final Board remedy.

Dated at Boston, Massachusetts,
November 8, 2016

Respectfully submitted,

/s/ Elizabeth A. Vorro
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AFFIDAVIT OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on November 8, 2016.

/s/ Elizabeth A. Vorro
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National Labor Relations Board, Region 01